

UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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GREAT AMERICA PAC, STOP HILLARY  
PAC and RON JOHNSON,

Plaintiffs,

-vs-

Case No. 16-CV-795-JDP

WISCONSIN ELECTIONS COMMISSION, Madison, Wisconsin  
and MICHAEL HAAS, in his official December 9, 2016  
capacity as Administrator of the 9:08 a.m.  
WISCONSIN ELECTION COMMISSION,

Defendants.

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STENOGRAPHIC TRANSCRIPT OF INJUNCTIVE HEARING  
HELD BEFORE THE HONORABLE JAMES D. PETERSON,

APPEARANCES:

For the Plaintiffs:

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For the Defendants:

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For Intervenor Jill Stein:

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\* \* \* \* \*

(Proceedings called to order.)

THE CLERK: Case No. 16-CV-795-JDP. *Great America PAC, et al. v. Wisconsin Elections Commission, et al.* Court is called for injunctive hearing. May we have the appearances, please.

THE COURT: Let's find out who we have on behalf of the plaintiffs.

MS. MORRISON: Good morning, Your Honor.  
Michael Morley. Michael Morley for the plaintiffs.

MR. HEIT: Along with Jay Heit. Herrick & Hart, Eau Claire.

THE COURT: Okay.

1 MR. KIRKPATRICK: Matthew Kirkpatrick of Herrick  
2 & Hart, Eau Claire.

3 MR. BACKER: Dan Backer.

4 THE COURT: All right. And who do we have on  
5 behalf of the Wisconsin Election Commission?

6 MR. MURPHY: Morning, Your Honor. My name is  
7 Mike Murphy from the Wisconsin Department of Justice. To  
8 my left is Attorney Tom Bellavia. And behind me to the  
9 far right is David Meany. And in the center is Colin  
10 Roth.

11 THE COURT: All right. Good morning to all of  
12 you. And on behalf of the intervening party Jill Stein?

13 MR. MEULER: Chris Meuler of Friebert, Finerty &  
14 St. John. Alongside David Lebowitz.

15 THE COURT: Okay.

16 MS. GREENBERGER: I'm Debbie Greenberger from  
17 Emery Celli Brinkerhoff & Abady.

18 THE COURT: Okay. And so who's the point  
19 for you? I assume it's Mr. Murphy on behalf of the  
20 Wisconsin Election Commission? Who's got the point for  
21 you?

22 MS. GREENBERGER: I do, Your Honor.  
23 Ms. Greenberger.

24 THE COURT: Okay. Very good. Okay. And then  
25 who's on the hot seat for the plaintiffs?

1 MR. MORLEY: I am, Your Honor.

2 THE COURT: All right. Very good. All right.  
3 I'll start with you, Mr. Murphy. I don't know if you  
4 noticed, but ten minutes ago or so I got a reply brief  
5 offered by the plaintiffs. I'll grant the motion to file  
6 the brief, so I'll accept that reply brief; gave it a  
7 quick read. Mr. Murphy, what do you -- have you had a  
8 chance to read it?

9 MR. MURPHY: Since I've been sitting here I  
10 would say that I've skimmed it.

11 THE COURT: Okay.

12 MR. MURPHY: I think that it was -- I think that  
13 it wisely drops the Equal Protection arguments. I think  
14 those were nonstarters. Beyond that, I think what we  
15 have here is a confirming that this recount is almost  
16 complete. It is on time. It is going smoothly. It is  
17 being run exactly as the state statutes called for it to  
18 be run, which is how the United States Constitution  
19 allows for elections to be run. I think that the only --  
20 really the only way that this recount will not be done,  
21 be effective and be valid is if the Court enjoins it, and  
22 the Court should not enjoin it on absolutely nothing but  
23 speculation. There's no evidence of a problem here on  
24 the either the timeline or the mechanics. I think that's  
25 not sufficient for standing, let alone irreparable harm.

1           We can move past equal protection. With the due  
2 process arguments made here, this is not a vote-denial  
3 case. The cases they cite are sort of in the  
4 neighborhood of vote delusion, but vote delusion has  
5 never been extended to hypothetical concerns of this  
6 nature and they shouldn't be. There's just no indication  
7 that anything is not on track to have this done properly  
8 and under the state statutes.

9           There's a strong public interest here because the  
10 Constitution does permit the states to prescribe the  
11 procedures to have this done. And what we're balancing  
12 here on the balancing test is that strong public interest  
13 against nothing but speculation, no real world problem,  
14 nothing even for standing let alone harm, and the  
15 injunction should be denied.

16           THE COURT: All right. Mr. Morley, what is it  
17 that you want now? It seems to me that all you're asking  
18 for me to do is try to clip Ms. Stein's wings as far as  
19 any future appeals or challenges to the Wisconsin  
20 election, actions which she hasn't taken or even  
21 indicated that she will take. What do you want?

22           MR. MORLEY: Yes, Your Honor. So there's two  
23 aspects to the request that we're seeking in light of the  
24 developments that have occurred: The first being as of  
25 right now, there are results in from 47 out of 82

1 counties. There are still 35 counties left. Co-counsel  
2 is absolutely correct that as of right now, there's no  
3 concrete evidence that there's going to be a problem  
4 beyond the simple fact that this recount is proceeding at  
5 quadruple the rate of the last statewide recount that we  
6 had where counties are being compelled to count twice as  
7 many ballots in half the time.

8 THE COURT: I get that.

9 MR. MORLEY: So if they're --

10 THE COURT: They're plenty fast. Go ahead. I  
11 understand.

12 MR. MORLEY: So part of -- so insofar as we're  
13 seeking relief with regard to the recount itself, it's a  
14 prophylactic measure. If the problem does arise, by the  
15 time a problem does arise it will be too late for us to  
16 come back, the safe harbor risks being blown. And so in  
17 order to prevent that, we've asked the Court either to  
18 stop the recount immediately in order to ensure the safe  
19 harbor won't be blown because we know the point of the  
20 recount, the reason for the request of the recount were  
21 baseless allegations that there were hacking and there  
22 were insecurities. There was fraud. Based on the  
23 results that we've seen in the recount to date, there's  
24 been virtually no change in the outcome of the election.  
25 There's not going to be --

1           THE COURT: I get that. Why should I stop the  
2 -- so I should stop the recount because there might be a  
3 problem. And if there's a problem, there's not time to  
4 come back to court and get it fixed. Okay. What else  
5 have you got?

6           MR. MORLEY: The bigger issue is if the recount  
7 proceeds according to its current specified deadline  
8 where it ends by 8 p.m. on Monday, the very next day is  
9 the safe harbor deadline. Wisconsin law grants five  
10 business days for it generating a new controversy, for  
11 generating a new challenge and appeal of the recount.  
12 And if the recount is allowed to proceed and in the  
13 absence of any further judicial action such as requiring  
14 that this court approve any challenge to make sure that  
15 it's good faith nonfrivolous, it would be solely in the  
16 control --

17           THE COURT: Why this court?

18           MR. MORLEY: Because this is where we're arguing  
19 that the right to vote is protected by the Federal Due  
20 Process Clause. The Fourteenth Amendment --

21           THE COURT: That would be your appeal.

22           MR. MORLEY: Excuse me, Your Honor?

23           THE COURT: That would be your challenge to it.

24           MR. MORLEY: Well, by eliminating the safe  
25 harbor, which is what a recount runs the risk of doing,

1 an appeal of the recount, if an appeal of the recount is  
2 allowed to commence, it runs the risk of destroying the  
3 safe harbor protection which does dilute the value of the  
4 vote, which does --

5 THE COURT: First of all, I don't understand  
6 that that is what would happen. If there were further  
7 appeal, we could investigate this election for months and  
8 months and months, but that wouldn't affect the safe  
9 harbor or the vote of the Electoral College or who's  
10 president. It would just mean that later on we would  
11 continue to find out if there were some malfeasance or  
12 fraud or errors in this election, but it wouldn't stop  
13 the Electoral College from electing Mr. Trump as the  
14 President.

15 So it would just provide that we would continue to  
16 investigate the election, but it wouldn't affect the  
17 integrity of the election for President. The country  
18 would continue to proceed, Mr. Trump would take office,  
19 and that would be fine. But then we could continue. If  
20 there were an appeal, which at this point is rank  
21 speculation, then we would continue to investigate the  
22 election. I don't see how that risks the safe harbor in  
23 the least.

24 MR. MORLEY: The safe harbor isn't about whether  
25 the electors can vote. Your Honor is absolutely correct



1 that regardless of whether of whether an election  
2 appeal -- an appeal of the recount occurs, Your Honor is  
3 absolutely correct. The electors can still vote. They  
4 will cast their votes for President-Elect Trump. The  
5 purpose of the safe harbor -- the safe harbor comes into  
6 effect on January 6 when it comes time for Congress to  
7 count the electoral votes. If an appeal is lodged to the  
8 recount such that there is a controversy pending on that  
9 safe harbor date, on December 13, when it comes time for  
10 Congress to count the votes, Wisconsin's electoral votes  
11 are no longer treated as "conclusive" under 3 U.S.C. 5  
12 and so votes that if there weren't a recount or if the  
13 recount were done by the 13th with no judicial challenge,  
14 votes that would be definitive, votes that would be  
15 conclusive that would not be subject to objection, that  
16 the voters of Wisconsin would have the guarantee are  
17 counted in accordance with --

18 THE COURT: I'm not sure I agree with that. I  
19 don't see that. Mr. Murphy, what happens? This recount  
20 is done on Monday.

21 MR. MURPHY: Right.

22 THE COURT: On Tuesday is the safe harbor date.

23 MR. MURPHY: That's right.

24 THE COURT: Even if there were an appeal,  
25 Wisconsin's electoral votes get counted. Am I right?

1 MR. MURPHY: That is right. And I'll be brief  
2 because all the points you've raised are exactly right.  
3 But the certification will happen by the safe harbor  
4 deadline and that is actually what triggers the five-day  
5 appeal. That's the timeline that's contemplated by the  
6 statutes. So you're absolutely right. There will be a  
7 certification. The votes will be sent to Congress.  
8 There will be no problem.

9 THE COURT: I'm just not seeing it.

10 MR. MORLEY: If I can refer Your Honor to 3  
11 U.S.C. Section 5, for the safe harbor to be satisfied the  
12 standard is that there must be a final determination of  
13 any controversy or contest regarding the electors. So if  
14 the recount is done by Monday, that's excellent and  
15 that's fine. That's not going to call any independent  
16 problems. But if an appeal is then lodged to the  
17 recount, which seems virtually inevitable, especially  
18 since Wisconsin uses the same exact standard, aggrieved  
19 candidate for lodging an appeal to the recount as was the  
20 Michigan standard for seeking a recount which Dr. Stein  
21 invoked, 3 U.S.C. 5 says in order to receive the  
22 protections of the safe harbor, there must be a final  
23 determination of any controversy or contest by that safe  
24 harbor date.

25 Here the deadline for starting a controversy or

1 contest about the recount would be Monday, the day before  
2 the safe harbor date. So Dr. Stein wouldn't even have to  
3 initiate the challenge until the safe harbor were already  
4 over. And so by that time, no matter what happens to the  
5 appeal, there's -- there is a problem that the safe  
6 harbor could be blown, which means then votes that would  
7 be treated as conclusive if the safe harbor were  
8 satisfied are now subject to review and objection when  
9 Congress counts them in January.

10 THE COURT: Yeah. Do you have any other  
11 authority other than your reading of that part of the  
12 federal code?

13 MR. MORLEY: Well, Your Honor, there's the fact  
14 that --

15 THE COURT: Because it is -- we often have a  
16 final determination in many things that this court does  
17 and then there are subsequent appeals. It doesn't mean  
18 that there wasn't a final determination. When it gets  
19 done, there'll be a final decision. Wisconsin's  
20 electoral votes are going to count -- I mean at this  
21 point, I'm not persuaded by any submission that you have  
22 made that Wisconsin's electoral votes are not going to be  
23 counted and it predicated all on rank speculation anyway  
24 about what might happen later.

25 MR. MORLEY: Well, if Your Honor interprets the

1 statute that way, if that's Your Honor's interpretation  
2 of 3 U.S.C. 5, we would wholeheartedly embrace that. If  
3 the Court is interpreting Section 5 to say that any  
4 appeal of the recount would not call into question  
5 Wisconsin's votes, would not waive the safe harbor  
6 protections that Wisconsin voters are entitled to, we  
7 would wholeheartedly embrace that interpretation.

8 THE COURT: That's my understanding of what  
9 would happen. Now again, my interpretation of that is,  
10 you know, it's like I'm not running Wisconsin's Electors  
11 when they meet and I'm not running the Electoral College.  
12 But my understanding is that if there's an ongoing  
13 investigation about whether the election aggrieved any  
14 candidate or whether there was some question about the  
15 integrity, that election could continue. But that it  
16 wouldn't stop the Electoral College from meeting,  
17 Wisconsin's votes being counted, and the President taking  
18 office. This is -- it's like -- and it's all based on  
19 speculation about what some aggrieved candidate might do.  
20 So I don't know, is that it? Is that all you want? Is  
21 there anything else?

22 MR. MORLEY: No, Your Honor. Those are our --  
23 we've withdrawn our Equal Protection claim and that was  
24 our Due Process claim.

25 THE COURT: All right. I've heard enough. The

1 only question that I have is whether this case has to be  
2 dismissed for lack of standing because it's clear that on  
3 the merits I will deny your request for an injunction.  
4 There is -- at the time this case was filed, there was, I  
5 think, a very questionable reading of *Bush v. Gore* as it  
6 applies to Wisconsin's recount procedure. I don't think  
7 *Bush v. Gore* says that the intent of the voter is a  
8 prohibited concern. I think *Bush v. Gore* endorses the  
9 idea that the intent of the voter is the starting point  
10 and the touchstone of vote counting. *Bush v. Gore* itself  
11 made clear that it was addressing the particular concerns  
12 that were caused by the punch card voting system that was  
13 used in Florida which was then subject to very  
14 inconsistent procedures during the recount. So none of  
15 that seemed to apply to Wisconsin's election or to  
16 Wisconsin's recount because we don't have that kind of  
17 system and we didn't have the kind of inconsistent  
18 treatment during the recount.

19 All of the challenges that you originally made to  
20 the idea of the way the Wisconsin statutes counted votes  
21 applied to the original election as well as to the  
22 recount. So if on the basis of your initial presentation  
23 the recount were invalid, the original canvass would have  
24 been invalid. And so your case on the equal protection  
25 grounds was dead on arrival.

1           Also the State very articulately pointed out very  
2 serious questions about the standing that your clients  
3 had to even bring this suit. It was not clear at all  
4 from your initial submissions that they had really  
5 suffered the kind of concrete and particularized error or  
6 harm that supports a federal case. I note that at the  
7 outset the question of whether a candidate is entitled to  
8 a recount is really fundamentally a question of state  
9 law; that states are the ones that articulate and set the  
10 rules for when a candidate is entitled to a recount.  
11 Apparently there's challenge to the manner of the  
12 recount, but there's apparently no question about  
13 Ms. Stein's entitlement to the recount.

14           Wisconsin laws says that a candidate can ask for a  
15 recount. If the election is extremely close, the state  
16 will pay for it. If it's not that close, the candidate  
17 has to pay for it. She paid for it. She got the  
18 recount. The recount was conducted substantially the  
19 same way that the initial canvass was conducted and it  
20 just didn't have the kind of *Bush v. Gore* problems. And  
21 it's not clear to me that your clients had anything other  
22 than a generalized disagreement with Wisconsin's recount  
23 procedures. So I question whether you have standing to  
24 bring this case in the first place.

25           I'm not going to dismiss it for that reason today.

1 I have the State's submission. You chose not to respond  
2 to the standing argument. So I'll make a decision about  
3 whether this case is dismissed for lack of standing. But  
4 even assuming that you had standing, I think that the  
5 relief you asked for here is so clearly unwarranted that  
6 there's no question that I have to deny the request for  
7 the injunction stopping the recount.

8 Even at the beginning of the recount there really  
9 was no indication that there was any real problem with  
10 the recount. The State was unequivocal. They were going  
11 to do it expeditiously. They would get it done more  
12 quickly. They simply weren't under the compulsion to  
13 finish by a deadline in the *Prosser-Kloppenburg* recount,  
14 so that is not the measure of how long it takes to do a  
15 recount. The State was under the burden to do it more  
16 quickly this time because it was a presidential election.  
17 Mr. Haas said that the recount would be done on time and  
18 we're standing here now a few days away from the end and  
19 the recount is 80 some percent complete; by your own  
20 admission that there has been no irregularity in the  
21 manner of doing the recount. So the recount looks like  
22 it's going, as the State said, smoothly, competently.  
23 And I note that the recount provision is not an attack on  
24 the integrity of the election. The recount is an  
25 inherent part of what ensures the integrity of elections.

1 If there's a doubt -- if there's a close election and  
2 there's a doubt about it, you double-check your work to  
3 make sure that there weren't errors.

4 Now, there may be errors that would evade detection  
5 during the recount procedure, but the recount is designed  
6 to make sure that at least all of the obvious sources of  
7 error are identified and corrected before the vote is  
8 finally certified. So there's nothing about this recount  
9 that impugns the integrity of Wisconsin's elections at  
10 all. It is, in fact, an inherent part of the system that  
11 the State has developed to ensure the integrity of  
12 elections.

13 As far as the challenge or the difficulty with the  
14 state safe harbor, I just don't -- I just don't see that.  
15 I don't know what's going to happen as a result of the  
16 recount, whether there's going to be a further appeal and  
17 further investigation. As I said, it's possible that a  
18 state could spend more time investigating the integrity  
19 of its election after the ballots are or the election is  
20 certified. That only makes sense. You have to very  
21 promptly move to make the results final and certified and  
22 live with the result. But that doesn't mean that you  
23 can't investigate the election electoral process after  
24 that. Who knows. Maybe we'll be spending months dealing  
25 with the integrity of this election, but it's not going



1 to have any impact on whether the Electoral College meets  
2 or who takes office.

3 I think everybody acknowledges that there's  
4 virtually no chance that the recount is going to change  
5 the results of the election at this point, so that's  
6 really not an issue. I think that we're going to have  
7 ongoing discussions for quite some time about the  
8 integrity of the 2016 election. I think that Mr. Trump  
9 himself has continued to make an issue of that. He's  
10 made claims about voter fraud in certain states. He's  
11 made claims about the mandate and the landslide that --  
12 as a result. So the count matters. I think that we're  
13 probably going to be talking about this for a long time.

14 But it's clear as crystal to me that I don't have a  
15 basis for stopping the recount. It's clear enough too  
16 that as far as the balance of harms go, the harm would be  
17 to the Election Commission and to candidate Stein if I  
18 were to stop the election because then it definitely  
19 wouldn't be done in time for the safe harbor -- to meet  
20 the safe harbor provision under federal law.

21 So with that, we're finished today. The motion for  
22 injunction is denied and I'll issue a decision that  
23 indicates whether the case is dismissed for lack of  
24 standing within the next few days.

25 Thank you all.

1 MR. MURPHY: Thank you.

2 MS. GREENBERGER: Thank you, Your Honor.

3 (Proceedings concluded at 9:28 a.m.)

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\* \* \* \* \*

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I, LYNETTE SWENSON, Certified Realtime and Merit

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Reporter in and for the State of Wisconsin, certify that

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the foregoing is a true and accurate record of the

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proceedings held on the 9th day of December 2016 before

11

the Honorable James D. Peterson, District Judge for the

12

Western District of Wisconsin, in my presence and reduced

13

to writing in accordance with my stenographic notes made

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at said time and place.

15

Dated this 9th day of December 2016.

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/s/\_\_\_\_\_

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Lynette Swenson, RMR, CRR, CRC  
Federal Court Reporter

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